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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 38

LA CROSSE TELEPHONE CORPORATION,
Appellant,
vs.
WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE AND J. E. FITZGIBBON, AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD.

No. 39

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL B-953, A. F. OF L.,
Appellant,
vs.
WISCONSIN EMPLOYMENT RELATIONS BOARD, L. E. GOODING, HENRY RULE AND J. E. FITZGIBBON, AS MEMBERS OF THE WISCONSIN EMPLOYMENT RELATIONS BOARD.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN.

BRIEF OF APPELLANT LA CROSSE TELEPHONE CORPORATION.

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TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented	2
Statutes Involved	2
Statement	3
Specification of Errors to be Urged	7
Summary of Argument	8
Argument	10
Point I. The decision of the Wisconsin Supreme Court in this case is in conflict with the decision of the Supreme Court of the United States in the Bethlehem Steel Case	10
Point II. The decision of the Wisconsin Supreme Court in this case is in conflict with the decision of the Supreme Court of the United States in the Allen-Bradley case wherein a jurisdictional question under the Wisconsin Employment Relations Statute was at issue	14
Point III. The Wisconsin Supreme Court has consistently adhered to the rule of "joint jurisdiction" and "case by case" determination of the jurisdictional issue in disputes involving employment relations	15
Point IV. By the Taft-Hartley Amendment to the National Labor Relations Act Congress has approved the Decision of the Supreme Court of the United States in the Bethlehem case, since by this amendment this interpretation was not	

changed and, furthermore, a provision for "ceding" jurisdiction under certain conditions was authorized 19

A. Congress enacted the amendments to the National Labor Relations Act after the decision of this Court in the Bethlehem case and, since no Congressional action was taken to the contrary, it must be assumed that Congress affirmed and approved the ruling of this court in the Bethlehem case .. 20

B. The Taft-Hartley Act amendments to the National Labor Relations Act provide for ceding jurisdiction to state agencies in limited and defined fields where the state statute is not inconsistent with the National Act, thereby implying intent that there shall be exclusive Federal Jurisdiction excepting only as specifically "ceded" 20

C. The Report of Congress while considering the Taft-Hartley amendments show Congressional intent of exclusive Federal Jurisdiction 22

Point V. The Wisconsin Supreme Court erred in this case in adjudging that the State Board had jurisdiction to determine contract rights of the employees and the company where the employer was engaged in a business affecting interstate commerce 23

Conclusion 25

Appendix A. Pertinent Provisions of the National Labor Relations Act 27

Appendix B. Pertinent provisions on this appeal of the Wisconsin Employment Relations Act, also denominated the Employment Peace Act (Wisconsin Stats. 1945, Ch. 111) 32

Table of Cases.

Allen Bradley Local 1111, United Electrical Radio and Machine Workers, et al. v. Wis. E. R. Board and Allen Bradley Company, 315 U. S. 740; 86 L. Ed. 1154; 237 Wis. 164; 295 N. W. 791 (1942) 9, 14, 15, 16

Bethlehem Steel Co., et al. v. New York State Labor Relations Board and Alleghany Ludlum Steel Corp. v. William J. Kelly, et al., 330 U. S. 767, 67 S. Ct. 1026, 91 L. Ed. 1054 ..... 5, 7, 9, 12, 17, 24, 25

Christoffel v. Wis. E. R. Board, 243 Wis. 332; 10 N. W. 2d 194 (1943) 16

Graves v. New York, 206 U. S. 466; 59 S. Ct. 595 21

Heald v. District of Columbia, 41 S. Ct. 42; 254 U. S. 20, 65 L. Ed. 106 20

Hotel & R. E. L. Alliance v. Wis. E. R. Bd. 236 Wis. 329, 294 N. W. 632; 295 N. W. 634 (1941) 16

International Union, etc. v. Wis. E. R. Bd., 245 Wis. 532, 15 N. W. 2d 832 (1944) 16

Pittsburgh Railways Co. v. Division 85 Amalgamated Assoc. Street Electric Railways and Motor Coach Employees of America, 357 Penna. 379, 54 Atl. 2d 891 ..... 17, 18

Public S. E. Union v. Wis. E. R. Bd., 246 Wis. 190, 16 N. W. 2d 823 (1944) 16

State of Missouri v. Ross, 299 U. S. 72, 57 S. Ct. 69 21

Wisconsin State Labor Relations Board v. Fred Rennping L. Co., 228 Wis. 473; 279 N. W. 673 (1938) 16

STATUTES AND MISCELLANEOUS.

Congressional Report, H. R. 3020 Sec. 10 (2)..... 22
House Reports, 205—80th Congress, First Session, p. 40-44 (Apr. 11, 1947)..... 22
Senate Committee Reports, S. 1126 Sec. 10 (a)..... 23
National Labor Relations Act, Act of July 5, 1935, 49 Stats. 449.....2, 27
Wisconsin Employment Relations Act, Chapter 111 Wis. Stats. 2, 4, 32
Wisconsin Law Review, 1946, p. 193, 194, 195..... 12

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OPINIONS BELOW.

The opinion of the Wisconsin Employment Relations Board of the State of Wisconsin (R. 17) is unreported.

The opinion of the Circuit Court of LaCrosse County, Wisconsin, 6th Judicial Circuit, is unreported.

The opinion of the Supreme Court of the State of Wisconsin (R. 48) written by Mr. Justice Fritz, is reported in Volume 251 Wis. 583; 30 N. W. (2) 241.

JURISDICTION.

The jurisdiction of this court is invoked under Section 237 (a) of the Judicial Code.

QUESTION PRESENTED.

Does the National Labor Relations Act, as enacted by Congress in 1937, preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of a local telephone corporation with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act or any fixed policy of the National Board.

STATUTES INVOLVED.

The statutes involved are:

1. Wisconsin Employment Relations Act, also denominated "Employment Peace Act", ch. 111 Wisconsin Statutes 1945 (Wisconsin Laws of 1939 Ch. 57 as amended by c. 515 s. 17 Laws of 1939; 48.08 (2); 1947 c. 2).

2. The National Labor Relations Act (Act. of July 5, 1935, c. 372, 49 Stats. 449, 29 U. S. C. Sec. 151 *et seq.*).

The pertinent provisions of each statute are attached as appendices A and B to this brief.

STATEMENT.

The facts which give rise to the issue here presented are as follows:

A petition was filed by the Telephone Guild, affiliated with the National Federation of Telephone Workers (hereinafter referred to as the Guild) with the National Labor Relations Board (hereinafter referred to as the National Board) at Minneapolis, Minnesota, alleging that a question of representation affecting commerce had arisen in the employer-employee relations of the LaCrosse Telephone Corporation (hereinafter referred to as the Company). This petition was filed on September 20, 1946. Eighteen days later, on October 8, 1946, the Guild also filed a petition with the Wisconsin Employment Relations Board (hereinafter referred to as State Board) requesting an election among the employees of the LaCrosse Telephone Corporation for the purpose of determining what, if any, representation such employees desired for the purpose of collective bargaining. On October 18, 1946, the State Board took jurisdiction and conducted a hearing at LaCrosse, Wisconsin, pursuant to the petition of the Guild. On November 27, 1946, the State Board directed that an election be held within 30 days and filed a memorandum decision (R. 17). In order to determine whether or not an election should be held, it was necessary for the State Board to pass upon the legal effect of a contract which the Company had with its employees, who were then affiliated with the International Brotherhood of Electrical Workers. The Company contended that the contract was a bar to the holding of an election since by the terms of the contract it was not to expire for over a period of a year and, though subject to amendment, by reason of the employees' request for amendment pursuant to its terms, such amend-

ments had been fully agreed upon between the company and the employees at the time the Guild's petition was filed with the National Board. In the memorandum decision filed by the State Board, the State Board found against the contention of the Company and its memorandum decision held, that the collective bargaining agreement which the company had with its employees (members of the International Brotherhood of Electrical Workers) was by its terms to expire on December 1, 1946, since amendments thereto had not formally received the Union's approval, and the Company notified of such approval until September 26 and 27, 1946, which was some seven days after the Guild filed its petition with the National Board and three days after notice of this petition was mailed to the company. The State Board concluded that there was a collective bargaining agreement from September 27, 1946 to December 1, 1947, but that there was no binding agreement on September 24, 1946, when the notice of the petition of the Guild was sent to the company by the National Board, in which petition the Guild claimed to represent a majority of the employees that the International Brotherhood of Electrical Workers then claimed to represent.

Pursuant to the provisions of the Wisconsin Statutes (Sec. 111.07 (8)) the Company petitioned the Circuit Court for LaCrosse County, Wisconsin, for a review of the decision of the State Board and contended that the decisions, orders and certifications of the State Board were without its jurisdiction, in excess of its statutory authority, erroneous as a matter of law, and contrary to the constitutional rights and privileges of the company (R. 2) in that the matter was under the jurisdiction of the National Labor Board. This petition for review in the Circuit Court for LaCrosse County, Wisconsin, came on for hearing before the Hon. R. S. Cowie, Circuit Judge for the Circuit Court in and for LaCrosse County, Wisconsin. Briefs were filed

and oral arguments had. The court took the matter under advisement and during the interim and before handing down a decision the Supreme Court of the United States, on April 7, 1947, decided the issues in the case of *Bethlehem Steel Company et al., appellants* v. *New York State Labor Relations Board* and the *Alleghany Ludlum Steel Corporation, appellant* v. *Kelly Steel*, constituting the State Labor Relations Board of the State of New York (330 U. S. 767-797, 91 L. Ed. 1234).

This decision was immediately brought to the attention of Judge Cowie by counsel for the appellants and on April 28, 1947, the court filed a memorandum decision (R. 1) in which the court held that the issues before the court were governed by the decision of the Supreme Court of the United States in the *Bethlehem* case, and that decision left no constitutional authority in the State Board to determine collective bargaining units, and to conduct collective bargaining elections among employees, whose employers are engaged in inter-state Commerce (R. 1). Pursuant to this memorandum decision, judgment was entered by the La-Crosse Telephone Corporation, reversing and setting aside the certification, decision and order made and entered by the Wisconsin Employment Relations Board.

The State Board appealed from the judgment of the Circuit Court of LaCrosse County, Wisconsin, to the Supreme Court of the State of Wisconsin pursuant to the provisions of the Wisconsin Statutes (R. 44). The State Board contended that the National Labor Relations Act did not preclude the State Board from conducting an election to determine representation of the employees of the LaCrosse Telephone Corporation, "irrespective of whether the National Board had ever taken any action involving its employees, and irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act, or any fixed policy of the National Board."

The LaCrosse Telephone Corporation contended that the decision of the Circuit Judge should be sustained and that the State Board had no jurisdiction in representation proceedings between the employees and employer of the LaCrosse Telephone Corporation, since the company was engaged in Inter-state Commerce, and that under Article I Section 8 and Article VI of the Constitution of the United States and by virtue of the decision in the *Bethlehem Steel* case, the State Board was without jurisdiction to conduct an election among its employees, and furthermore, was without jurisdiction to adjudge that no contract existed between the company and its employees.

The Supreme Court of the State of Wisconsin reviewed the judgment of the Circuit Court of LaCrosse County and held that the State Board had jurisdiction to conduct an election to determine bargaining representatives for the employees of the LaCrosse Telephone Corporation and that such jurisdiction existed irrespective of whether the National Labor Relations Board had ever taken any action involving the company and its employees, and irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act, or any fixed policy of the National Board and rejected the contention of the appellants that in Article I Section 8 and Article VI, Clause 2 of the Constitution of the United States the National Board had exclusive jurisdiction over the questions dealt with in the State Board proceedings (R. 48).

Appeals were taken to this court in both the *LaCrosse Telephone Corporation* and the *International Brotherhood of Electrical Workers Local B-953* cases. It was stipulated to consolidate the cases for purposes of briefing, argument, consideration, and decision (R. 47) and that there should be one transcript of record (R. 68). This court on April 19, 1948 entered an order postponing further consideration of the question of jurisdiction until such time as the cases could be heard on the merits (R. 71).

SPECIFICATION OF ERRORS TO BE URGED.

1. The Supreme Court of Wisconsin erred in reversing and setting aside the decision of the Circuit Court for LaCrosse County, Wisconsin, made and entered in this cause on May 5, 1947, and adjudging that a certification made by the Wisconsin Employment Relations Board of the election of the Telephone Guild of Wisconsin as a bargaining representative for employees of the Telephone Corporation was valid and within the jurisdiction of the Wisconsin Employment Relations Board under the Wisconsin Employment Peace Act.

2. The Supreme Court of Wisconsin erred in holding that under the provisions of Section 8 of Article I and Paragraph Two of Article VI of the Constitution of the United States, the Wisconsin Employment Peace Act can legally be applied to the issue of determining the bargaining representative for employees where the employer is engaged in interstate commerce;

3. The Supreme Court of the State of Wisconsin erred in holding that under the provisions of Section 8 Article I and Paragraph Two of Article VI of the Constitution of the United States, the Wisconsin Employment Relations Board has jurisdiction to determine the contract rights of employer and employee where the employer is engaged in interstate commerce.

4. The Supreme Court of Wisconsin erred in not applying the decision of the Supreme Court of the United States in the case of the *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board* and *Alleghany Ludlum Steel Corporation* v. *William J. Kelly, et al.*, 330 U. S. 767, 67 Sup. Ct. 1026, 91 L. Ed. 1054.

5. The Supreme Court of Wisconsin erred in holding that the Wisconsin Employment Relations Board has jurisdiction over employer-employee relations of the LaCrosse Telephone Corporation arising out of the question of choice of units of representation for bargaining purposes, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act or any fixed policy of the National Board.

SUMMARY OF ARGUMENT.

The issue in this case is stated in the decision of the Supreme Court of the State of Wisconsin as follows:

> "Does the National Labor Relations Act preclude the Wisconsin Employment Relations Board from conducting an election to determine the desires of employees of the local (LaCrosse) Telephone Corporation (found by the court to be 'rendering in connection therewith such intra state and interstate long distance service as is incidental thereto') with respect to a collective bargaining representative, irrespective of whether the National Labor Relations Board has ever taken any action involving the company and its employees, and irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act, or any fixed policy of the National Board?" (R. 49).

Appellant Company concedes that this is the issue to be determined on this appeal. This appeal therefore presents a very narrow question, the determination of which is important in the administration of labor relations in the State of Wisconsin, and to settle the confusion that now exists by reason of the conflicting interpretations now being given

to the issue of jurisdiction under the National Labor Relations Act.

Appellants contend on this appeal:

1. The decision of the Wisconsin Supreme Court in this case is in conflict with the decision of the Supreme Court of the United States in the *Bethlehem Steel* case (330 U. S. 767).

2. The decision of the Wisconsin Supreme Court in this case is in conflict with the decision of the Supreme Court of the United States in the *Allen Bradley* case (315 U. S. 750) wherein a jurisdictional question under the Wisconsin Employment Relations Statute was at issue.

3. The Wisconsin Supreme Court has consistently adhered to the rule of "joint jurisdiction" and "case by case" determination of the jurisdictional issue in disputes involving employment relations.

4. By the Taft-Hartley Amendment to the National Labor Relations Act Congress has in effect approved the decision of the Supreme Court of the United States in the *Bethlehem* case, since by this amendment this interpretation was not changed, and furthermore, provision for "ceding" jurisdiction under certain conditions was authorized.

5. The Wisconsin Supreme Court erred in this case in adjudging that the State Board had jurisdiction to determine contract rights of the employees and the Company where the employer was engaged in a business affecting interstate commerce.

We shall discuss each of the above contentions in the order outlined.

ARGUMENT.

I.

THE DECISION OF THE WISCONSIN SUPREME COURT IN THIS CASE IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE BETHLEHEM STEEL CASE.

The irreconcilable conflict of the decision of the Wisconsin Supreme Court in the case at bar and the decision of this Court in the *Bethlehem Steel* case is demonstrated by comparing quotations from these cases on the same issues.

Wisconsin Supreme Court.	United States Supreme Court.
1. "That although the National Board's power over that subject is paramount, it is not exclusive in such a case as we have here, until the Federal power is exercised or jurisdiction thereto is taken as to particular employees."	1. "The *Companies* contend that the National Board's jurisdiction over their labor relations is exclusive of said power; the *State* contends on the contrary that while Federal power over the subject is paramount, it is not exclusive and in such a case as we have here until the Federal power is actually exercised as to the particular employees, State power may be exercised. "*The State argues for a rule that would enable it to act until the Federal Board had acted in the same case.*"
2. "The State Board's action, which is under consideration on these appeals, does not involve the exercise of its discretion, nor the formulation of any policy which does not, or could vary from the National Labor Relations Act."	2. "Comparison of the State and Federal Statutes will show that both governments have laid hold of the same relationship for regulation and involves the same employers and the same employees. Each has delegated to an administrative authority, a wide discretion in applying this plan of regulation to specific

WISCONSIN SUPREME COURT.

UNITED STATES SUPREME COURT.

cases, and they are governed by somewhat different standards. Thus if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past. Cf. *Re Creamery Package Mfg. Co.*, 34 NLRB (f) 108; Wis. Emp. Rel. Bd. case III No. 348 E-117. But the power to decide a matter can hardly be made dependent on the way it is decided. As said by Mr. Justice Holmes for the Court, 'When Congress has taken the particular subject matter in hand coincidence is as ineffective as opposition * * * If the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other. The second to act either must follow the first, which would make its action useless and vain, or depart from it, which would produce a mischievous conflict. The State argues for a rule that would enable it to act until the Federal Board had acted in the same case. But we do not think that a case by case test of Federal supremacy is permissible here.'

Although it might be argued that the majority opinion of this Court in the *Bethlehem* case leaves some doubt as to the import of the Court's decision on the issue of jurisdiction, appellant contends that the separate opinion of

Justice Frankfurter in that case indicates clearly that this Court adjudicated that the National Labor Relations Act gives exclusive jurisdiction to the National Board within the field covered by Congress in the act, and even though the National Board had there ceded certain jurisdiction to the New York State Board, a situation which we do not have in the case at bar. The language of Justice Frankfurther, concurred in by Justices Murphy and Rutledge is as follows:

> "The court's opinion carries at least overtones of meaning that, regardless of the consent of the National Board, New York is excluded from enforcing rights of collective bargaining, in all industries within its border as to which Congress has granted opportunity to enforce the authority of the National Board."
>
> *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board*, 330 U. S. 767, 778.

Because the issue before the Wisconsin Supreme Court was so unequivocally stated by that court, it appears to appellants that it is unnecessary for an adjudication of the issue here to analyze in detail the similarities and dissimilarities of the Wisconsin Employment Relations Act and the National Labor Relations Act.

That there are similarities and differences is well stated by counsel for the respondent in an article written by her and published in the Wisconsin Law Review, 1946, p. 193, which is of significance in that the author of that article is the representative of the Wisconsin Attorney General's Department who must represent the Wisconsin Employment Relations Board in appeals taken from the State Board's decision, including the case at bar. The following are a few excerpts from that article:

> "Both Boards are given the further function of facilitating the bargaining process by ascertaining as a fact what is an appropriate bargaining unit and

who or what is the chosen bargaining representative of employees in such a unit, *although there are substantial differences in the extent of the powers of the two Boards and in the procedural requirements.*" (Page 194.)

"The points in which the Wisconsin Employment Peace Act departs from the scheme of the National Labor Relations Act represents a distinct difference in philosophy as to what practices need to be prevented for the avoidance of industrial conflicts. This difference in philosophy is apparent in the very first provision of the two laws containing their declarations of policy." (Page 195.)

Wisconsin Law Review, 1946.

For the determination of the issues here presented, it is sufficient to say that both acts provide for the choosing of bargaining representatives of employees and grant to the boards created by the two acts jurisdiction to decide representation matters. Under the Wisconsin Act the Wisconsin Supreme Court contends for state jurisdiction under all circumstances until the National Board has taken jurisdiction—"irrespective of whether the action of the State Board contravenes any substantive provisions of the National Act or any fixed policy of the National Board." In the case at bar the Wisconsin Supreme Court held:

"Although the National Board's power over that subject is paramount, it is not exclusive in such a case as we have here until the Federal power is exercised, or jurisdiction thereto is taken as to particular employees" (R. 55).

Appellants contend that the issue on this appeal is the same as the issue in the Bethlehem case, excepting that in the Bethlehem case the State of New York Board had been ceded jurisdiction by the National Labor Relations Board over certain industries and had been given concurrent jurisdiction over others. There is no arrangement of such a character between the National Board and the Wisconsin

State Board. There are therefore, more cogent reasons for applying the law of the *Bethlehem* case to the case at bar than there were in the *Bethlehem* case.

It is therefore submitted (1) that the *Bethlehem Steel* case squarely decides that a State Labor Board has no jurisdiction in a situation such as is presented at bar, and (2) that, therefore, the decision of the Wisconsin Supreme Court here on this appeal must be reversed.

II.

THE DECISION OF THE WISCONSIN SUPREME COURT IN THIS CASE IS IN CONFLICT WITH THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE ALLEN-BRADLEY CASE WHEREIN A JURISDICTIONAL QUESTION UNDER THE WISCONSIN EMPLOYMENT RELATIONS STATUTE WAS AT ISSUE.

The case of *Allen-Bradley Local 1111, United Electrical Radio and Machine Workers, et al., Appellants* v. *Wisconsin Employment Relations Board, and Allen-Bradley Company, Respondents*, 315 U. S. 740, 86 L. Ed. 1154, 237 Wis. 164, 295 N. W. 791 (1941) is important and significant on this appeal because in that case the Wisconsin Employment Relations Statute and the National Labor Relations Act were before this Court for decision of the jurisdictional question involved. This Court resolved the issues in the *Allen-Bradley* case in favor of state jurisdiction and upheld the Wisconsin Supreme Court on the narrow ground, that the State, under its police power,—even though the industry was engaged in interstate commerce—had there the right to regulate employees' conduct in labor relations, since the matter of employee regulation was without the scope of the National Labor Relations Act. Therefore the National Labor Relations Board neither had nor could take jurisdiction of the issue in that case. The United States Supreme Court did not pass upon the validity of the Wisconsin law

as a whole but only upon that portion which authorized the State Board to issue such an order as was there entered prohibiting mass picketing and other employee conduct. This Court held that the mere fact that it was contended that other portions of the act were invalid since they were incompatible and hostile to the policy expressed in the Federal Act, nevertheless, since the State Act provided for severability, should its constitutionality be attacked, this Court would not consider the portions of the State Act which were not then before it.

The Allen-Bradley decision by this Court was a forewarning to the Wisconsin Supreme Court. The following language of the Supreme Court of the United States in the *Allen-Bradley* case is significant on this issue of conflict of jurisdiction:

> "If the order of the State Board affected the status of the employees, or if it caused a forfeiture of the collective bargaining rights, a distinctly different question would arise."
>
> *Allen-Bradley Local 1111 United Electrical Radio and Machine Workers, et al.* v. *Wisconsin Employment Relations Board and Allen Bradley Company*, 315 U. S. 740, 751.

III.

THE WISCONSIN SUPREME COURT HAS CONSISTENTLY ADHERED TO THE RULE OF "JOINT JURISDICTION" AND "CASE BY CASE" DETERMINATION OF THE JURISDICTIONAL ISSUE IN DISPUTES INVOLVING EMPLOYMENT RELATIONS.

The rule of "case by case" determination and the right of "dual jurisdiction" as announced by the Wisconsin Supreme Court in the case at bar is consistent with the previous holdings of that court in all of its decisions since the enactment of the Wisconsin Employment Relations Act.

The Wisconsin court first considered this question of State-Federal jurisdiction in the case of *Wisconsin Labor Board* v. *Fred Reuping L. Co.*, 228 Wis. 473; 279 N. W. 673 (1938). In that case the court said:

> "We see no reason to anticipate and determine when and under what circumstances the State Board is ousted of jurisdiction."

The court has adhered to that rule in each of its subsequent cases.

Hotel and R. E. I. Alliance v. *Wis. E. R. Board*, 236 Wis. 329, 294 N. W. 632, 295 N. W. 634 (1941).

Allen-Bradley Local 1111 v. *Wis. E. R. Board*, 237 Wis. 164; 295 N. W. 791 (1941).

Christoffel v. *Wis. E. R. Board*, 243 Wis. 332, 10 N. W. 2d 194 (1943).

International Union Etc. v. *Wis. E. R. Board*, 245 Wis. 417, 14 N. W. 2d 872 (1944).

International B. of E. W. v. *Wis. E. R. Board*, 245 Wis. 532, 15 N. W. 2d 832 (1944).

Public S. E. Union v. *Wis. E. R. Board*, 246 Wis. 190, 16 N. W. 2d 823 (1944).

Since a complete survey of the facts and decisions in these Wisconsin cases is not necessary for a decision in the case at bar, reference is made to them, however, to show the consistent policy of the Wisconsin Supreme Court.

By reason of these consistent holdings of the Wisconsin Supreme Court on the issue of jurisdiction—which that Court has now re-affirmed and even enlarged upon by its decision in the case at bar—we now have in Wisconsin a chaotic condition in the administration of employer-employee relationships with no rule. The Wisconsin Court has now stated clearly that it is committed to the rule of "case by case determination" and dual jurisdiction "Irre-

spective of whether the National Labor Relations Board has taken jurisdiction and irrespective of whether the actions of the State Board contravene any substantive provisions of the National Act or any fixed policy of the National Board.". The net result is that we now have in Wisconsin a situation where employers and employees have a "choice of forum" and the right "to shop around" between State and Federal jurisdiction in order to determine the jurisdiction most advantageous to the interests of the parties. We are confronted with the practical problem foreseen by this Court in the *Bethlehem* case in the following language:

> "Thus if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter, conducting hearings, supervising elections, and determining appropriate units for bargaining in the same plant. They might come out with the same determination, or they might come out with conflicting ones as they have in the past."
>
> *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board*, 330 U. S. 767, 775.

To further illustrate the confusion that exists on this question of jurisdiction, we call this Court's attention to a decision of the Supreme Court of Pennsylvania in the case of *Pittsburgh Railways Co.* v. *Division 85 of Amalgamated Association of Street Electric Railway and Motor Coach Employees of America*, 357 Penna. 379, 54 Atl. 2d 891, decided September 29, 1947.

The issue in that case was the question of the jurisdiction of the Pennsylvania Labor Relations Board to determine the appropriate unit for the purpose of collective bargaining. The Pennsylvania court in its opinion found that the Pittsburgh Railways "is admittedly engaged in interstate commerce within the meaning of the National Labor Relations Act". In the Pennsylvania case the court heard a re-

argument of the issues "because of the possible effect of the decision of the Supreme Court of the United States in the *Bethlehem Steel Company* case—upon the question of jurisdiction in the present case." The court then went on to analyze the holding of the United States Supreme Court in the *Bethlehem* case and used the following significant language:

> "The subject matter of the instant dispute does not constitute or represent 'a separable or distinct segment of the matter covered by the Federal Statute' nor can it be said 'that the Federal Agency has not acted on that segment'—Congress, having exercised its power, did not intend to permit state action with regard thereto—the clear implication of the decision of the Supreme Court of the United States in the Bethlehem Steel case—is that wherever the employer-employee relationship is one over which Congress has the power of regulation and with regard to which Congress has acted, State Power is suspended and can not constitutionally be exercised. To permit the exercise of state power in such circumstances would effectively negative the supremacy of Congressional Legislature."

The Court then concluded:

> "The criterion to determine validity of the exercise of State Power is not whether the agency administering Federal Law has acted upon the relationship in a given case; rather, it is whether Congress has asserted its power to regulate that relationship."
>
> *Pittsburgh Railways Co.* v. *Division 85 of Amalgamated Association of Street Electric Railway and Motor Coach Employees of America*, 357 Penna 379, 54 Atl. 2d 891, 896.

From the foregoing decision it is very apparent that the Pennsylvania Supreme Court has arrived at a conclusion on the issue of jurisdiction directly opposed to that of the conclusion arrived at by the Wisconsin Supreme Court in

the case at bar. The importance of an adjudication of an established principle for future guidance of employer-employee relationship is thus apparent.

IV.

BY THE TAFT-HARTLEY AMENDMENT TO THE NATIONAL LABOR RELATIONS ACT, CONGRESS HAS APPROVED THE DECISION OF THE SUPREME COURT OF THE UNITED STATES IN THE BETHLEHEM CASE, SINCE BY THIS AMENDMENT THIS INTERPRETATION WAS NOT CHANGED AND, FURTHERMORE, A PROVISION FOR "CEDING" JURISDICTION UNDER CERTAIN CONDITIONS WAS AUTHORIZED.

The Taft-Hartley Act amendments to the National Labor Relations Act affirm the adjudication of this Court in the *Bethlehem Steel* case that Congress intended that the National Labor Relations Board has exclusive jurisdiction in the field of Labor Relations in matters affecting commerce. This is true because:

A. Congress enacted the amendments to the National Labor Relations Act after the decision of this Court in the *Bethlehem* case and, since no Congressional action was taken to the contrary, it must be assumed that Congress affirmed and approved the ruling of this Court in the *Bethlehem* case.

B. The Taft-Hartley Act amendments to the National Labor Relations Act provide for ceding jurisdiction to state agencies in limited and defined fields where the state statute is no inconsistent with the National Act, thereby implying intent that there shall be exclusive Federal Jurisdiction excepting only as specifically "ceded".

C. The Report of Congress while considering the Taft-Hartley amendments show Congressional intent of exclusive Federal Jurisdiction.

A.

Congress Enacted the Amendments to the National Labor Relations Act After the Decision of This Court in the Bethlehem Case and, Since No Congressional Action Was Taken to the Contrary, It Must Be Assumed That Congress Affirmed and Approved the Ruling of This Court in the Bethlehem Case.

It is a well settled rule of law that where a statute, that has been construed by the court of last resort, has been re-enacted in the same or substantially the same terms, the legislature is presumed to have been familiar with the construction and adopted it as a part of the law unless a contrary intent clearly appears. In the case of *Heald* v. *District of Columbia*, 41 S. Ct. 42, 254 U. S. 20, 65 L. Ed. 106, this court stated the rule as follows:

> "Where provisions of a statute had previous to their re-enactment, a settled significance, that meaning will continue to attach to them in the absence of plain implication to the contrary."

B.

The Taft-Hartley Act Amendments to the National Labor Relations Act Provide for Ceding Jurisdiction to State Agencies in Limited and Defined Fields Where the State Statute Is Not Inconsistent With the National Act, Thereby Implying Congressional Intent of Federal Jurisdiction Excepting Only as Specifically "Ceded".

The Taft-Hartley Act amendments to the National Labor Relations Act provides for the "ceding" of jurisdiction as follows:

> "That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications,

and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provisions of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith."

Title 29, Sec. 160 (a) U. S. C.

By this amendment Congress has made provision for the ceding of partial jurisdiction to the states by the National Board. This provision would have been unnecessary if the State Board already had such jurisdiction. Excepting for the limited jurisdiction ceded the balance of the National Board's power, by implication, was retained in the National Board. In the passage of the Taft-Hartley amendments, Congress had the opportunity to alter the court's construction of the National Labor Relations Act in the *Bethlehem* case. Congress chose not to do so but to enact amendments in other particulars. This evidences a clear legislative intent to ratify the construction placed upon the statute by this court in the *Bethlehem* case. The following rulings of this court apply:

"Moreover Congress in the first of these decisions has permitted the clause as it now appears—to stand—this is pursuasive evidence of the adoption by that body of the judicial construction."

State of Missouri v. *Ross*, 299 U. S. 72, 57 S. Ct. 60.

"It is true that the silence of Congress when it has authority to speak may sometimes give rise to an implication as to the Congressional purpose."

Graves v. *New York*, 206 U. S. 466, 59 S. Ct. 595.

C.

The Report of Congress While Considering the Taft-Hartley Amendments Show Congressional Intent of Exclusive Federal Jurisdiction.

The Congressional Report of Section 10 (2) Title 29 Par. 160 (a) of the amended National Labor Relations Act supports the construction of the Act which denied state jurisdiction of the subject matter touched upon by the act, unless otherwise expressly provided. This is confirmed by the pertinent provisions of a Report of the House Committee on Education and Labor which contained the following:

> "The board is empowered as hereinafter provided, to adjudicate complaints of unfair labor practices affecting commerce filed by the administrator. Such power of the Board shall be exclusive."
>
> H. R. 3020 Sec. 10 (2).

The committee indicated that it thought the "exclusive" jurisdiction which would thereby be given to the board necessitated a special provision giving the states "a concurrent jurisdiction in respect to closed shop and other union security arrangements" and it referred to the act as an "illustration of the policy calling for uniformity in matters of national policy under the commerce clause." It said that "since the National Act Congress pre-empts the field that the act covers insofar as commerce within the meaning of the act is concerned" the saving provision was necessary."

> House Reports 205, 80th Congress, First Session, pp. 40-44 (Apr. 11, 1947).

The Senate Committee Report referred to the section briefly and said that the provision was added to permit the National Labor Relations Board "to allow state labor

relations boards to take final jurisdiction of cases in borderline industries (that is, borderline insofar as interstate commerce is concerned) provided the state statute conforms to national policy."

S. 1126 Sec. 10 (a).

The senate provisions as originally reported used the language "to concede to such agency jurisdiction." When finally adopted after the conference report the word "concede" was changed to "cede." Concede and cede are not precisely synonimous, although each can be construed to mean "surrendering" or "granting." The word "cede" is restricted to this meaning. The word "concede" can have the additional meaning "to acknowledge." (See Webster's International Dictionary, Second Edition). It seems significant therefore that Congress should use the word "cede" in [illegible]ating its intent was to retain jurisdiction in the national Board.

V.

THE WISCONSIN SUPREME COURT ERRED IN THIS CASE IN ADJUDGING THAT THE STATE BOARD HAD JURISDICTION TO DETERMINE CONTRACT RIGHTS OF THE EMPLOYEES AND THE COMPANY WHERE THE EMPLOYER WAS ENGAGED IN A BUSINESS AFFECTING INTERSTATE COMMERCE.

Before assuming jurisdiction of the representation issue in this case, it was necessary for the State Board to adjudicate the issue as to whether or not there was a contract between the company and its employees. This issue involved a complex factual and legal question. The company maintained that there was a contract and that such a contract was a bar to the determination of the representation issue by the State Board. In deciding this issue the State Board held that it had jurisdiction of the contract question and made findings of fact and conclusions of law.

to the effect that there was no binding contract which operated as a bar to their taking of jurisdiction of the representation issue. The Wisconsin Supreme Court upheld the findings and conclusions of the State Board.

In presenting this issue before the Wisconsin Supreme Court the State Board contended that this adjudication by it was a ministerial act without legal force. The company contended that the act was not ministerial but judicial in character and had legal force because failure to comply with it resulted in an unfair labor practice charge and the attending results of being enjoined by judicial proceedings. The Wisconsin Court upheld the State Board's contention and resolved this issue in the following language:

> "The mere fact-finding procedure of the State Board in the ascertainment of facts, and its thereupon ordering and conducting an election and certifying the result thereof, constitutes action in merely its ministerial capacity" (R. 55).

The attempt to justify the State Board's decision in this case by calling its acts "ministerial" rather than "judicial" does not change the import of the State Board's action. This court took cognizance of procedures of this character by administrative boards in the *Bethlehem* case where the court stated as follows:

> "Thus, if both laws are upheld, two administrative bodies are asserting a discretionary control over the same subject matter—if the two boards attempt to exercise a concurrent jurisdiction to decide the appropriate unit of representation, action by one necessarily denies the discretion of the other."
>
> *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board*, 330 U. S. 767, 775.

The administration of either the State Act or the National Act calls for the exercise of judgment and discretion

by the board both in finding the facts and in determining the orders to be entered. Different administrative agencies will arrive at different conclusions. This was the case in Creamery Package Manufacturing Company, 34 N. L. R. B. (f) 108; Wisconsin Employment Relations Board, Case 3 No. 348 E-117 referred to by Justice Jackson in the Bethlehem decision. After stating the issue it was decided by this Court in the *Bethlehem* case with this language:

> "But the power to decide the matter can hardly be dependent upon the way it is decided."
>
> *Bethlehem Steel Company, et al.* v. *New York State Labor Relations Board*, 330 U. S. 767, 775.

Thus, in the final analysis the issue is essentially that of jurisdiction. If the State Board had no jurisdiction, it is irrelevant to argue that its action was merely ministerial. Whether ministerial or judicial, it has usurped power in a field which Congress has exclusively granted to the National Labor Relations Board. Any exercise of judgment and discretion by the State Board infringes upon the jurisdiction of the National Board. Congress imposed that discretion and judgment in the National Board alone. The State Board's determination here was without its jurisdiction and void.

Conclusion.

For the reasons set forth, it is respectfully submitted that the judgment of the Wisconsin Supreme Court should be reversed.

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APPENDIX A.

Pertinent Provisions of the New York State Labor Relations Act.

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq.*) are as follows:

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contact, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impair-

ment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended, from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * * * *

SEC. 4. (a)

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The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed.

* * * * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer

with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

* * * * *

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the

unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

* * * * *

SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a)), as amended from time to time, or of section 77B, paragraphs (l) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (l) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

APPENDIX B.

The pertinent provisions on this appeal of the Wisconsin Employment Relations Act, also denominated the Employment Peace Act (Wisconsin Statutes, 1945, Chapter 111) are as follows:

SUBCHAPTER I.

EMPLOYMENT PEACE ACT.

111.01 *Declaration of policy.* The public policy of the state as to employment relations and collective bargaining, in the furtherance of which this subchapter is enacted, is declared to be as follows:

(1) It recognizes that there are three major interests involved, namely: That of the public, the employe, and the employer. These three interests are to a considerable extent interrelated. It is the policy of the state to protect and promote each of these interests with due regard to the situation and to the rights of the others.

(2) Industrial peace, regular and adequate income for the employe, and uninterrupted production of goods and services are promotive of all of these interests. They are largely dependent upon the maintenance of fair, friendly and mutually satisfactory employment relations and the availability of suitable machinery for the peaceful adjustment of whatever controversies may arise. It is recognized that certain employers, including farmers and farmer cooperatives, in addition to their general employer problems, face special problems arising from perishable commodities and seasonal production which require adequate consideration. It is also recognized that whatever may be the rights of disputants with respect to each other in any controversy regarding employment relations, they should not be permitted, in the conduct of their controversy, to intrude directly into the primary rights of third parties to earn

a livelihood, transact business and engage in the ordinary affairs of life by any lawful means and free from molestation, interference, restraint or coercion.

(3) Negotiations of terms and conditions of work should result from voluntary agreement between employer and employe. For the purpose of such negotiation an employe has the right, if he desires, to associate with others in organizing and bargaining collectively through representatives of his own choosing, without intimidation or coercion from any source.

(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated. While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat. [1939 c. 57; 43.08 (2)]

* * * * *

111.02 *Definitions.* When used in this chapter:

* * * * *

(2) The term "employer" means a person who engages the services of an employe, and includes any person acting on behalf of an employer within the scope of his authority, express or implied, but shall not include the state or any political subdivision thereof, or any labor organization or anyone acting in behalf of such organization other than when it is acting as an employer in fact.

* * * * *

(4) the term "representative" includes any person chosen by an employe to represent him.

* * * * *

(6) The term "collective bargaining unit" shall mean all of the employes of one employer (employed within the state), except that where a majority of such employes engaged in a single craft, division, department or plant shall have voted by secret ballot as provided in section 111.05 (2) to constitute such group a separate bargaining unit they

shall be so considered, provided, that in appropriate cases, and to aid in the more efficient administration of the employment peace act, the board may find, where agreeable to all parties affected in any way thereby, an industry, trade or business comprising more than one employer in an association in any geographical area to be a "collective bargaining unit". A collective bargaining unit thus established by the board shall be subject to all rights by termination or modification given by this subchapter I of chapter 111 in reference to collective bargaining units otherwise established under said subchapter. Two or more collective bargaining units may bargain collectively through the same representative where a majority of the employes in each separate unit shall have voted by secret ballot as provided in section 111.05 (2) so to do.

111.05. *Representatives and elections.* (1) Representatives chosen for the purposes of collective bargaining by a majority of the employes voting in a collective bargaining unit shall be the exclusive representatives of all of the employes in such unit for the purposes of collective bargaining, provided that any individual employe or any minority group of employees in any collective bargaining unit shall have the right at any time to present grievances to their employer in person or through representatives of their own choosing, and the employer shall confer with them in relation thereto.

(2) Whenever a question arises concerning the determination of a collective bargaining unit as defined in section 111.02 (6), it shall be determined by secret ballot, and the board, upon request, shall cause the ballot to be taken in such manner as to show separately the wishes of the employes in any craft, division, department or plant as to the determination of the collective bargaining unit.

(3) Whenever a question arises concerning the representation of employes in a collective bargaining unit the board shall determine the representatives thereof by taking a secret ballot of employes and certifying in writing the results thereof to the interested parties and to their employer or employers. There shall be included on any ballot

for the election of representatives the names of all persons submitted by an employe or group of employes participating in the election, except that the board may, in its discretion, exclude from the ballot one who, at the time of the election, stands deprived of his rights under this subchapter by reason of a prior adjudication of his having engaged in an unfair labor practice. The ballot shall be so prepared as to permit of a vote against representation by anyone named on the ballot. The board's certification of the results of any election shall be conclusive as to the findings included therein unless reviewed in the same manner as provided by subsection (8) of section 111.07 for review of orders of the board.

(4) Questions concerning the determination of collective bargaining units or representation of employes may be raised by petition of any employe or his employer (or the representative of either of them). Where it appears by the petition that any emergency exists requiring prompt action, the board shall act upon said petition forthwith and hold the election requested within such time as will meet the requirements of the emergency presented. The fact that one election has been held shall not prevent the holding of another election among the same group of employes, provided that it appears to the board that sufficient reason therefor exists. [1939 c. 57; 1939 c. 515 s. 7; 43.08 (2)]